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KYSC1975-SC-0689-03

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PETITION FOR REHEARING

SUPREME COURT OF KENTUCKY

FILE NO. 75-689


LARRY GARR BENNETT

PETITIONER

VS.

COMMONWEALTH OF KENTUCKY

RESPONDENT

PETITION FOR REHEARING

 DAVID E. MURRELL
 DEPUTY PUBLIC DEFENDER
 625 LEAWOOD DRIVE
 FRANKFORT, KENTUCKY 40601

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Petition For Rehearing has been mailed to Hon. Harold Y. Saunders, Judge, Shelby Circuit Court, Shelby County Courthouse, Shelbyville, Kentucky 40065; Hon. Lucien L. Kinsolving, Commonwealth Attorney, County Courthouse, Shelbyville, Kentucky 40065; Hon. Neil S. Hackworth, Trial Counsel, P.O. Box 224, Shelbyville, Kentucky 40065; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 1st day of June, 1976.

FILED

JUN 1 1976

 MARTHA LAYNE COLLINS
 CLERK
 SUPREME COURT



SUPREME COURT OF KENTUCKY

FILE NO. 75-689

LARRY GARR BENNETT

PETITIONER

VS.

COMMONWEALTH OF KENTUCKY

RESPONDENT

PETITION FOR REHEARING

* * * * *

MAY IT PLEASE THE COURT:

ARGUMENT

THE COURT MISCONSTRUED THE FACTS AND MISCONCEIVED THE LAW APPLICABLE THERE-TO BY STATING IN ITS OPINION THAT THE PETITIONER WAS NOT ENTITLED TO A DEFENSE OF HOME INSTRUCTION.

The Court in its opinion states: (1) that the Petitioner was only in fear of harm to the person and, therefore, not entitled to a defense of home instruction; and (2) that the incident occurred outside of the home. (Opinion, p. 1).

First, it is clear from the record that the deceased had engaged the Petitioner in an argument and had assaulted the Petitioner. T.E., p. 73. From the Petitioner's own story, he (Petitioner) retreated to the safety and security of his own apartment. T.E., pp. 73-74. The Petitioner was not only fearful of what might happen to his person, but he was also fearful that the deceased would take his money. T.E., p. 74.

The Court also states that the incident occurred completely outside of the apartment. It is clear that a substantial portion of the incident occurred within the apartment. The Petitioner testified as follows:

A. Then he says, "How much money you got left" and I asked him why. He said, "Oh, I was just wondering", so, I pulled my keys out of my car and went upstairs... (T.E., pp. 73-74) (Emphasis added.)

A. He said, "Are you going to take me to Frankfort", and I said, "no". He said, "Well, I can take the damn car". That's when I grabbed my keys out of my car and headed up the stairs. I did not walk on my crutches because I could move faster without them. So, I went upstairs and opened the door and went in, and the first thing I done was took the money out of my pocket and put it underneath the mattress. (T.E., p. 74). (Emphasis added).

A. I went to the top of the stairs, and Mr. Boothby was coming toward the stairway, and I hollered, "Charlie, stop, I got a gun, please go away and leave me alone"....

A. Four or five times I hollered at him. I kept telling him, "Charlie, please don't. Go away and leave me alone". He was getting pretty close and I thought, well, I will rack the gun and he will hear the noise and he will go. (T.E., p. 75).


It is the contention of the Petitioner that the decision in Sawyer v. Commonwealth, Ky., 227 Ky. 435, 13 S.W.2d 267 (1929), cannot be distinguished in principle since in that case the deceased was also shot while climbing steps leading to the defendant's home.

The Petitioner was entitled to a defense of home instruction. The self-defense instruction does not cover the theory of the case.

CONCLUSION

For the foregoing reasons, we request that the opinion of the Court be withdrawn and a new opinion issued reversing the judgment.

Respectfully submitted,


DAVID E. MURRELL
DEPUTY PUBLIC DEFENDER
625 LEAWOOD DRIVE
FRANKFORT, KENTUCKY 40601

COUNSEL FOR PETITIONER

Rendered: April 30, 1976

SUPREME COURT OF KENTUCKY
File No. 75-689

LARRY GARR BENNETT

APPELLANT

V. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE HAROLD Y. SAUNDERS, JUDGE
No. 5331

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION PER CURIAM

Affirming

We are of the opinion that the trial court properly declined to give appellant's proffered instruction on defense of home. The evidence is that the appellant was fearful for his personal safety. The incident took place outside the residence, and the appellant was entitled only to the self-defense instruction as given by the trial court.

We are further of the opinion that the trial court properly excluded from the evidence records of prior misdemeanor convictions of the decedent for assault, flourishing a deadly weapon and disorderly conduct. Appellant's argument that this exclusion denied him due process of law is totally without merit.

The judgment is affirmed.

All concur.

ATTORNEYS FOR APPELLANT:

Jack Emory Farley
Public Defender

David E. Murrell
Deputy Public Defender
625 Leawood Drive
Frankfort, Kentucky 40601

ATTORNEYS FOR APPELLEE:

Ed W. Hancock
Attorney General

Robert W. Hensley
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601